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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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IN THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil Action No. 4020

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Plaintiff-Appellee;

vs.

ILLINOIS COMMERCE COMMISSION, ET AL.,

Defendants-Appellants.

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, his statement in opposition to appellants' statement as to jurisdiction. Appellee includes herein his motion to dismiss the appeal or in the alternative to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellee asserts that the unsubstantial

character of the grounds stated by appellants is so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of the proceeding. Appellee also shows that the judgment of the District Court must in any event be affirmed upon the findings of the court as to the confiscatory character of the rates sought to be enforced by the appellants. The allegations of the complaint in that behalf stand admitted and the findings and conclusions of the court unchallenged, thus giving an independent and additional ground of support for the decision below.

The matters here relied upon by appellee are more particularly stated below:

I.

The Controlling Facts Found by the Court Were Pleaded in the Complaint and Stand Admitted by Appellants' Motion Below.

The appellants filed no answer below and elected to stand upon their motion to strike the complaint and dismiss the cause, thereby admitting all facts set out in the complaint and Exhibits A, B, and C thereto attached.

On the final hearing the court had before it the sworn complaint, and the supporting evidence previously received at the preliminary hearing, which included the full texts of the reports and orders of the Interstate Commerce Commission pleaded in the complaint. The court also had before it (1) an order of the Interstate Commerce Commission in its Docket No. 11860, a proceeding entitled "Montana Rates and Fares" entered March 24, 1942, attached hereto as Appendix A, and (2) the opinion of the New York *nisi prius* judge in *Transit Commission* v. *Long Island R. Co.*, attached to appellants' statement on this appeal as Appendix D.

II.

Appellee's Authority to Charge the Increased Passenger Fares Derives from a Connected Series of Interstate Commerce Commission Orders by Which That Commission Exercised Its Paramount and Exclusive Jurisdiction Over the Intrastate Rates Here Involved.

In the third paragraph of appellants' statement under a heading entitled "The Facts," the erroneous statement is made that appellee's right to charge the increased fares here involved is based alone upon the 1942 order of the Interstate Commerce Commission in Ex Parte No. 148 (Complaint, Exhibit B). The inaccuracy of this statement becomes at once apparent upon reading Sections VII, VIII and IX of the complaint, Exhibits A and B attached thereto, and the court's findings 3 to 8, inclusive. It is there shown and found that the Interstate Commerce Commission first exerted its power and authority over these Illinois intrastate suburban passenger fares of the appellee in a proceeding entitled "In the Matter of Intrastate Fares Within the State of Illinois, Docket No. 11703" (102 I. C. C. 479), in which the 1925 report and order (Exhibit B attached to the complaint herein) was entered. That 1925 order was a supplemental order dealing only with these passenger fares of Chicago and North Western Railway Company, whose property and affairs are now possessed and operated by appellee as trustee. As noted in Exhibit B, the original order in that proceeding is reported at 59 I. C. C. 350. As there shown, the proceeding was conducted and these orders entered pursuant to paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act (49 U. S. Code, Sec. 13(3)-(4)), a copy of which is attached hereto as Appendix B. The original report discusses and points out the paramount power of Congress under these paragraphs with respect to

intrastate rates where discrimination against interstate commerce exists. (59 I. C. C., at pages 359-362.)

It further appears from the complaint and findings herein that the supplemental report and order, Exhibit A, like the original report and order, followed a nationwide investigation of freight and passenger rates and charges throughout the United States after the close of the First World War, as a result of which a 20% increase was permitted.[1] That proceeding was the first general rate case before the Commission following the World War. It was a so-called "revenue" case, in that it was an application by the railroads as a whole for a general rate increase necessary to meet increased costs.

The 1925 order, Exhibit A, authorized a 20% increase in these intrastate suburban fares of the appellee in order to bring the level of such rates up to that of the interstate rates which had previously been increased 20% as above noted. This authority was exerted under Section 13 for the express purpose of thus eliminating the undue prejudice, preference and advantage in favor of intrastate commerce and the unjust discrimination against interstate commerce which the Commission found to exist by virtue of the 20% differential between the two classes of fares where the two classes of commerce were being served under substantially the same circumstances and conditions. That is to say, interstate and intrastate passengers traveled in the same cars, sometimes riding in the same seats, and received in all respects substantially the same service, for which the former paid 20% more than the latter.

Following the 1925 order, the Chicago and North Western Railway Company secured an interlocutory injunction restraining the Illinois Commission and other officials from

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[1] That proceeding was entitled "Ex Parte No. 74, *Increased Rates, 1920*." (58 I. C. C. 220 and reference thereto at 59 I. C. C. 354.)

interfering with its establishment and collection of the fares as then increased. The case was never carried further and the injunction still stands.

The 1925 order was of a continuing nature and contained an express provision that it should remain in force until further order of the Interstate Commerce Commission. This is specifically pleaded in the complaint and set forth in the Court's findings here.

In 1936 a further general and nationwide investigation of railroad passenger fares took place. This proceeding was known as Docket No. 26550, Passenger Fares and Surcharges. (214 I. C. C. 174.) While the order in that proceeding resulted in no change in appellee's Illinois intrastate fares, the order contained, nevertheless, a specific reference to the 1925 order and Docket No. 11703. (Exhibit A) and the Commission thereby retained its continuing jurisdiction over appellee's Illinois intrastate commutation passenger fares.

Finally, in the most recent general rate case, which was also a revenue case, the Interstate Commerce Commission again exercised its continuing power and jurisdiction over appellee's intrastate commutation passenger fares in Illinois. In that proceeding, known as Ex Parte No. 148, the Commission entered its order authorizing a general 10% increase in passenger fares on January 21, 1942. The order is attached to the complaint herein as Exhibit B. By reference to the 1936 proceeding, Docket No. 26550, the Commission made this 10% increase in passenger fares specifically applicable to the fares which appellee had established pursuant to the 1925 order in Docket No. 11703, by expressly modifying that and other outstanding section 13 orders.

It was in pursuance of the permission and authority thus granted to the appellee that he filed tariffs on February 6, 1942, with each the Illinois and the Interstate Commissions,

setting forth charges with respect to this Illinois intrastate commutation passenger traffic 10% greater than those then in existence, which were the ones authorized by the 1925 order. The effective date of these tariffs was March 8, 1942. The 10% increase therein stated is the matter here in controversy.

Had the 1942 order (Exhibit B) not modified the 1925 order and thus permitted the increase in fares here involved, the discrimination against interstate commerce found and ruled out in the 1925 order would have been at once revived. The findings in the 1925 order still stand and the Commission's authority over these fares still continues in effect. Simple arithmetic proves the necessity of raising the intrastate fares coincidental with the present raise of interstate fares if the relationship of equality found necessary and provided in 1925 is to be preserved. It seems hardly necessary to add that the presumption of correctness of the 1925 findings must necessarily continue until a showing of changed conditions may justify their modification, in a direct proceeding before the Commission. For that matter the Court may well take judicial notice that the general character of the territory and operations involved has not changed materially. No mountain ranges have sprung up at the Illinois-Wisconsin state line since 1925 to produce different operating conditions interstate in this commutation traffic than exist intrastate. Neither are there any other material differences. And we may well assume that any change in conditions deemed by these appellants sufficient to justify a change in those 1925 findings, would now be made the subject of a complaint before the Interstate Commerce Commission whose latch-string pointedly has been left hanging out.[2]

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[2] The order expressly retains jurisdiction "for the purpose of determining, if need be, the lawfulness of any fare or fares, resulting from this order." See complaint, Exhibit B, next to last paragraph.

Appellants by their motion below have admitted these essential facts establishing the source and continuity of the Interstate Commerce Commission's control over these rates; admitted the existence of the findings in the 1925 order and the correctness thereof as pleaded in the complaint herein, and have admitted the existence of the 1936 order and the 1942 order retaining control and modifying the 1925 order so as to permit the increase here in question. Nevertheless, in their attack upon this rate increase they persist in treating the 1942 order as though it were a thing apart, having no connection or continuity with that which had gone before. In so doing they completely disregard and ignore the facts above mentioned, all of which were found by the Court showing that the 1942 order is *not a wholly new order.* It is simply an *amending and supplementing order.* It and the previous orders dealing with the intrastate commutation passenger fares of the Chicago and North Western Railway Company in Illinois, *taken together,* completely establish appellee's right to these increases. This failure of appellants to recognize these undisputed facts constitutes, in our view, a fundamental weakness rendering their attack on the 1942 order completely ineffective.

III.

The Increased Passenger Fares Here Involved Were Authorized as a Result of Emergency Conditions in a General Rate proceeding. It Was a So-called "Emergency" or "Revenue" Case. It Granted "Blanket" Authority to Increase All Rates Described Therein in General Terms.

In Ex Parte No. 148, the order of January 21, 1942 (Exhibit B) dealt only with passenger fares. As stated in the complaint (p. 10) the Commission on March 2, 1942, issued its report dealing with both increased passenger fares and increased freight rates, and at that time made a

second order dealing with freight rates only. That report and order were submitted to and considered by the Court here at the hearing on the motion for an interlocutory injunction and again on final hearing. Appellants have attached to their statement on jurisdiction here as Appendix C one section only of this report entitled "Passenger Fares and Passenger-Train Services."

The report consists of more than 45 sheets and sets forth numerous other findings and facts. Without reproducing the entire report, we attach hereto as Appendix C certain additional sheets, bearing the same numbers as were shown in the mimeographed report released by the Commission on March 2nd. Facts there found (in addition to those stated in appellants' Appendix C and the order itself) give further support to the order with respect to passenger fares and disclose the general scope, purpose and effect of the proceeding. They may be summarized as follows:

1. The proceeding was instituted shortly after the carriers had been subjected to wage increases of approximately $311,000,000 per year resulting from a strike threat, followed by Emergency Board action under the Railway Labor Act. Necessary increased wage costs of $20,000,000 per year for non-unionized employes, and $30,000,000 per year to protect their properties against sabotage during the war period, were also shown. (Sheets 2 and 3.)

2. The increases were requested for the specific purpose of yielding additional revenue to enable the carriers to meet the increased expenses and insure their ability to continue rendering adequate and efficient service as contemplated by Section 15a of the Interstate Commerce Act. (Sheet 3.)

3. These increased operating costs were general in character and applicable to all traffic handled by the carriers, and the only practical method to meet them was a general percentage increase in all rates and fares, with certain ex-

ceptions not here material. The petition of the railroads called for a general investigation. (Sheet 4.)

4. The request was for a general increase in all rates and fares under the jurisdiction of the Commission, with specific reference to those covering intrastate traffic and specific reference to Section 13(3), and, accordingly, notice of the proceeding given to the states as required by that section. (Sheet 2.)

5. The case was characterized and submitted by counsel for the Class I carriers as "a revenue case, not a rate case." (Sheet 6.) The Commission treated the case as such, and the case involved no investigation or inquiry into specific rates or groups of rates. (Sheets 19, 43.)

6. The inquiry relative to proposed increases in passenger fares was nation wide and specifically covered intrastate fares over which the Commission had jurisdiction by reason of previously outstanding orders. The purpose and intent of the carriers' petition and of the Commission's findings and order was to include an increase in such intrastate fares. (Sheets 12-14.) As pointed out in the complaint below, the Commission's order of January 21st specifically provided for such increase.

7. The "Conclusions and Findings" set forth in the Commission's report clearly state the general character of this proceeding. Commenting upon the general character of the evidence, the Commission said (Sheet 43):

> "Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs. There will be some element of hardship and sacrifice whatever we do, or if we do nothing."

The Conclusions also contain a short reference to previous general rate cases involving blanket adjustments of

freight and passenger fares, showing this to be the same type of case. (Sheets 43-44.) It is pointed out that "the exigencies of the case do not permit" of considering the needs of each railway individually with corresponding adjustment of their respective schedules. (Sheet 45.)

8. The authorized 10% passenger fare increase will yield increased revenue for the railroads as a whole in excess of $45,000,000 per year. (Sheet 44.)

9. The Commission's finding and conclusion in granting in part the requested freight rate increases is tied up with the passenger fare increases as follows (Sheet 48):

> "We therefore conclude and find that the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable *if passenger fares are increased to the extent already permitted by our order*, and if freight rates and charges are increased to the extent indicated below and as more particularly specified in Appendix 2." (Italics ours.)

A second fundamental and, we believe, fatal weakness in appellants' attack upon the 1942 order permitting the 10% increase in passenger fares arises because of their failure to recognize Ex Parte No. 148 as a general or "blanket" rate proceeding. This will be pointed out further below.

IV.

This "Blanket" Method of Rate Making in So-called "Emergency" or "Revenue" Cases Has Long Had Specific Approval by This Court.

In the *New England Divisions* case, 261 U. S. 184, the court pointed out the greatly broadened scope of power and responsibility vested in the Interstate Commerce Commission by Transportation Act, 1920, particularly the require-

ment that the Commission fix and determine rates which would enable the railroads of the nation as a whole to maintain and operate an adequate national system of railroad transportation. (Pp. 189-91) The case involved a subsidiary power of the Commission—that of fixing reasonable divisions of through rates between carriers. The number of carriers involved was said to be in excess of six hundred. The order was attacked because the Commission had not proceeded to require specific evidence and render a specific adjudication with respect to each carrier. In rejecting that contention, the court pointed out that such a requirement in a general case of that nature "would be tantamount to denying the possibility of granting relief." (P. 197.)

The opinion by Mr. Justice Brandeis then proceeds to state the historical development of rate making under the Interstate Commerce Act and to find specifically that there is no constitutional obstacle to the adoption or pursuit of this method of rate making, and to show that it has been previously approved by the Court in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, where it was pointed out that serious injustice which might otherwise result from the making of rates in this manner by "blanket" orders "could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing" (pp. 197-9).[3]

Again in *United States* v. *Louisiana*, 290 U. S. 70, similar contentions were made in an attack upon an increased rate order of the Commission issued under Section 13 raising certain intrastate rates in Louisiana. Following the doctrine of the *New England Divisions* case and applying it to this Section 13 case, the court said that Section 13 (4) properly construed (p. 75):

[3] The orders in Ex Parte No. 148 contain such a clause.

"confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. * * *

"* * * § 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the *New England Divisions Case, supra*, 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

The opinion by Mr. Justice Stone goes on to point out that rates thus increased are subject to later adjustment as to any individual rate or group of rates upon a proper subsequent showing to the Commission (pp. 76-8). There was a saving clause in the Commission's order similar to that mentioned above in the 1942 order here under consideration. The further complaint in that case that the Commission had made no express finding that the increased intrastate rates would be reasonable was rejected by the Court. It was held that no such specific finding was necessary since the order on its face showed its intent and effect to prescribe a level of intrastate rates dovetailing with interstate rates prescribed by the Commission (p. 78).

Reaffirmance of this doctrine of the *New England Divisions* case is presently at hand in the following quotation from the opinion by Mr. Chief Justice Stone, delivered in March, 1942, in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America*, — U. S. —, 62 S. C. R. 736:

"The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions. Section 5 of the Act was modeled on the provisions of the Transportation Act, 49 U. S. C. §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. See *New England Divisions Case*, *supra*, 201-02, 203, n. 21. Cf. Sharfman, The Interstate Commerce Commission, vol. 2, pp. 381-82; *Driscoll* v. *Edison Co.*, 307 U. S. 104."

V.

The Interstate Commerce Commission's Power Under Section 13 Is Paramount and Exclusive. It Has Been Exercised Here So as To Leave the Defendants Without Right, Power or Authority to Interfere With Collection of the Fares Authorized by the 1942 Order in Ex Parte No. 148.

This proposition is quite apparent from the doctrine of the *New England Divisions* and *Louisiana* cases above. It has been so frequently stated in the decisions of this Court as to have become axiomatic. The paramount character of the authority exercised by the Federal Government is implicit in the power itself under our system of dual sovereignties. In this particular instance it is also written into the Federal Statute specifically by the requirement at the end of paragraph (4) of Section 13 to the effect that the rates fixed by the Interstate Commission "shall be

observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

This is but one of numerous Federal Statutes which have been sustained under the Commerce Clause by holdings of this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate. *Labor Board* v. *Fainblatt*, 306 U. S. 601.

In *Florida* v. *United States*, 292 U. S. 1, 6, it was specifically held that the Interstate Commerce Commission has the power under Section 13 (4) to prescribe intrastate rates solely for the purpose of removing discrimination against interstate commerce "caused by a disparity of intrastate rates viewed from a revenue standpoint." It is definite on the face of the orders relied upon here (Exhibits A and B attached to the complaint) that the purpose and effect of these orders is to do just that in this case. In the 1942 order the Commission found that the 10% increase in all passenger fares was necessary in order to enable the railroads to meet increased expenses arising during the present emergency period; that the increase is necessary to enable them to continue to render adequate and efficient railway transportation service during the emergency; and that the increased fares will be reasonable and lawful.

In view of the Commission's previous findings in the 1925 order with respect to the necessity of bringing the Chicago and North Western Railway intrastate commutation fares up to and maintaining them at the level of the interstate commutation fares, it could not well have done otherwise in the 1942 order than was done by specifically modifying the 1925 order so as to provide for a 10% increase in these intrastate fares contemporaneously with the 10% increase in the interstate fares. To have done

otherwise would have resulted in a revival of the discrimination against interstate commerce previously condemned in the 1925 order.

VI.

Appellants' Attack Upon the Order in Ex Parte No. 148 Is Purely Collateral in Character. Hence the Order Must Be Given Full Effect Unless Shown to Be Void on Its Face.

In 1922, in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232, and *New York* v. *United States*, 257 U. S. 591, 42 Sup. Ct. 239, the Court construed, applied and gave full force and effect to section 13 (3) and (4) and other provisions of the act, as amended in Transportation Act, 1920.

The *Wisconsin* case was a suit brought by a railroad operating to, from, and within the State of Wisconsin against the Railroad Commission and other state officials of Wisconsin to enjoin them from interfering with the maintenance of intrastate passenger fares established by the Interstate Commerce Commission. The *New York* case was a suit brought by the State of New York and others against the United States and the members of the Interstate Commerce Commission to annul and enjoin the enforcement of an order of the Interstate Commerce Commission requiring interstate railroads operating in intrastate commerce in the State of New York to increase certain passenger fares and other charges for the purpose of bringing intrastate rates to the level of interstate rates previously fixed by the Commission. In each case the order of the Interstate Commerce Commission was sustained by the Court.

In the *New York* case the Court clearly marked the distinction as to the scope of the Court's inquiry in the two cases. The Court held that in the *New York* case,

since it was a direct attack against the order of the Interstate Commerce Commission, the evidence which was of record before the Commission could be considered by the Court to determine whether the findings and order were supported by evidence. In the *Wisconsin* case, which was of the same character as this appeal, the Court made it clear that the evidence of record before the Commission was not before the Court and could not be brought before the Court, since the cause was in legal effect a collateral attack against the Commission's order (257 U. S. at p. 600):

> "The Wisconsin Case was a suit by a railroad against the state authorities to prevent the latter from penalizing the railroad for complying with the order of the Commission. To this suit the United States and the Commission were not parties. The defense of the state authorities was *a collateral attack* upon the order, to prevail in which they were obliged to show that the order was void on the face of the findings without regard to the evidence or the absence of it." [Italics ours.]

VII.

The Attack on the Ex Parte No. 148 Order Because of Alleged Lack of Essential Findings Is Entirely Without Substance.

The cases relied upon by appellants did not involve general rate orders, but were direct attacks upon orders involving specific local rate situations. Such cases are inapplicable here where appellants to prevail must show the 1942 order to be void on its face—a complete nullity.

The cases cited in appellants' jurisdictional statement in no way impair the validity of the action which has been here authorized by the Commission and carried out by the appellee in the filing of tariffs setting up the increased charges. Each one of those cases involved a local rate

situation and in no sense took on the character of a general rate investigation such as Ex Parte No. 148. The requirements as to findings in such a case are necessarily quite different from those in a general rate investigation. In various kinds of special rate investigations and other special proceedings, this Court has pointed out the necessity for the Commission making the essential findings as to basic or quasi-jurisdictional facts. Thus, in the *Power Reverse Gear* case (*United States* v. *B. & O. R. Co.*, 293 U. S. 454, 463), under the Locomotive Inspection law the Commission had no authority to prescribe power reverse gear equipment upon locomotives unless such installations would eliminate or reduce "unnecessary peril to life or limb." The Commission's report and order in that case contained no such finding and the Court therefore held that its order prescribing such installations was void.

We have no such hiatus here, for as we have seen above, the 1925 order and the 1942 order of the Interstate Commerce Commission each contain all of the findings essential to their validity and appropriate to the action taken by the Commission in each of those instances. The findings in the 1925 order as to the inadequacy and confiscatory character of the previously existing intrastate commutation fares, the reasonableness and lawfulness of the 20% increased fares then prescribed and the necessity for bringing the level of the intrastate fares up to that of the interstate fares, still exist and continue and are now supplemented by the further findings in Ex Parte No. 148 showing necessity for and reasonableness of a further 10% increase in both interstate and intrastate commutation fares at this time.

There is evident here such a complete and adequate set of findings as would meet all tests, *even if this were a case involving a direct attack upon an order of the Commission in a special or localized rate proceeding.* It is, of course,

not necessary here to go so far in the examination of the findings here involved. We point out, however, that if it were necessary to meet a direct attack upon this order, the record here would meet the test of rules laid down in decisions such as those relied upon by appellants. Even in such cases "it is not the form but the substance of the findings and order which controls." *Quanah, A. & P. Ry. Co.* v. *United States*, 28 F. Supp. 916, 918, affirmed 308 U. S. 527; rehearing denied 309 U. S. 694.

Mr. Justice Brandeis stated the requirement as to findings correctly and authoritatively in the *Power Reverse Gear* opinion, as follows:

> "In the *Florida* case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in *Beaumont S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, compare *Virginian Ry.* v. *United States*, 272 U. S. 658, 675, is not fatal to the validity of the order. It is true that formal and precise findings are not required, under § 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 428. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But § 14 (1) does not remove the necessity of making, *where orders are subject to judicial review*, quasi-jurisdictional findings essential to their constitutional or statutory validity." (Italics ours.) (pp. 464-465).

The foregoing quotation refers to the *Florida Log* case cited and relied upon so heavily here by appellants (*Florida v. United States*, 282 U. S. 194). That case involved rates on intrastate log traffic in a certain section of Florida and the question whether or not they were maintained at such a low level as to prejudice interstate traffic in logs between Florida and Georgia. Contrary to a statement contained in appellants' brief here, the case was one of *direct attack* and full judicial review of the Commission's order. The court pointed out that the Commission had erroneously undertaken to remove an asserted discrimination against interstate commerce by prescribing a statewide scale of intrastate log rates, without having prescribed a state-wide scale of interstate log rates or made any findings as to the revenue produced or to be produced by either the interstate rates or the intrastate rates. Hence there was no basis for the Commission's finding of discrimination against interstate commerce, and that ultimate finding standing alone in the case was held insufficient to support the Commission's order.

That was an entirely different situation than that which we have here where all basic and jurisdictional findings were made to support the discrimination order in 1925 and all basic and jurisdictional findings to support the general rate order in the 1942 revenue case were made. Furthermore, this is admittedly a collateral attack upon the orders of the Commission here involved, and all with which this Court need concern itself are the questions: Is the Interstate Commerce Commission's 1942 order, amending the 1925 order, *upon its face*, a valid order or a void order? Does it show on its face that the Commission acted within a field over which Congress had given it power to act? If so, the order must be sustained. Taking the two orders together, as must necessarily be done, their validity and adequacy in

the face of this kind of attack is clear beyond any question. For that matter they fully meet the test if taken separately.

Like the *Florida Log* case, the *Indiana Coal* case, (*United States* v. *C. M. St. P. & P. R. R.*, 294 U. S. 499) was a proceeding to enjoin the enforcement of an Interstate Commerce Commission order—a direct judicial review of the order. It involved a local rate situation entirely. The preservation of adequate rail transportation on a national railway transportation system was in no sense involved in either one of those cases. In each case the full record before the Commission, including the evidence, was before the Court for review. There is not, and cannot be, any such situation before this Court in the kind of proceeding we have here. This is made clear by the cases of *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and *New York* v. *United States*, 257 U. S. 591, above cited.

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48, also relied upon by the appellants here, was another case of direct attack and full judicial review of a commission order. It was an injunction suit against the Kansas Public Utilities Commission to set aside that Commission's order permitting a utility company to increase its rates for electricity. The Commission in permitting the increase simply found that the utility "should be authorized and permitted" to do so (p. 51), without any finding that the old rates were unreasonably low or that the new rates would be reasonable—in fact, without any other finding of any kind. In holding the Commission's order void Mr. Chief Justice Taft made the following very plain statement of the legal principles which govern this subject (pp. 58-9):

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the

State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

Since the Kansas Commission's power to take any action in that matter derived exclusively from the Kansas statute giving it the power to prescribe rates to replace rates found to be unreasonable, its order necessarily fell because on its face it was lacking in any expression showing that the Commission had acted within the scope of its authority. Such findings are those of the "basic" or "quasi-jurisdictional" character mentioned in the later cases, to some of which we have referred above. Such are the rules where the validity of an administrative body's order is being directly challenged and reviewed.

Atchison Ry. v. *United States*, 295 U. S. 193, offers nothing on the subject not already covered in the previous discussion. The basic fact upon which the Commission's decision rested could not be discerned by the Court as the report of the Commission contained conflicting conclusions in that behalf (pp. 201-2). Hence, on direct attack the order was set aside. In the *"Hot Oil"* Case (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388) the President's proclamation issued without any finding of fact or statement of reason purporting to justify its issuance was rightly condemned

and held unenforceable. Sec. 9(c) of the National Industrial Recovery Act did not require any finding and it was held to be an unconstitutional attempt to delegate legislative power. These decisions like the others relied upon by appellants are inapplicable here for the reasons above stated.

Frequently Commission decisions make supporting findings as to various factual elements involved,[4] but these, while encouraged by the courts and helpful in cases of direct review, are not essential and their absence will not render a Commission decision void, even on direct review, where the decision contains sufficient, otherwise, to show that the Commission acted within the scope of its statutory authority. As stated by Judge Augustus N. Hand in *Visceglia* v. *United States*, 24 F. Supp. 355, 357, with reference to the Interstate Commerce Commission's obligations under Section 14 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 14 (1)):

> "It was not necessary to make 'formal and precise findings' in a case of this type and to set out all the primary evidence that was considered, but only findings 'basic or essential.'" (Citing cases hereinabove considered.)

The contention as to inadequacy of the Commission's findings is unsound because it fails to recognize the general and legislative character of the Commission's order and the long established and approved process of rate-making as employed by the Commission in Ex Parte No. 148.

In proceeding thus to raise the general level of passenger rates 10% in Ex Parte No. 148, the Commission was acting in its quasi-legislative capacity no less than if it

[4] As we have pointed out the Commission did so in Ex Parte No. 146.

had been dealing with individual rates or groups of rates instead of dealing with the rate structure as a whole. *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 387-8. As therein stated by Mr. Justice Roberts, when the Commission declares what are to be the reasonable and lawful rates for the future "it speaks as the legislature, and its pronouncement has the force of a statute" (p. 386). See also Mr. Chief Justice Hughes in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 50, et seq.: "The fixing of rates is a legislative act."

It is important to bear in mind that in Ex Parte No. 148 the Commission as the agency of Congress was simply carrying out the congressional mandate and effectuating the congressional policy to provide the carriers with sufficient revenues to preserve and maintain a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense (Transportation Act, 1940, Sec. 1; 49 U. S. C. Sec. 1; pocket Supp., p. 3; Appendix D hereto attached). This policy originally adopted in Transportation Act, 1920, and since carried forward, frequently has been considered and commented upon in Supreme Court decisions showing that preservation of "earning capacity" of the carriers has thereby become "a matter of national concern."

Texas & Pac. Ry. v. *Gulf, Etc., Ry.*, 270 U. S. 266, 277;
Dayton-Goose Creek Ry. Co. v. *United States*, 263 U. S. 456, 478;
Western Pacific v. *South. Pac. Co.*, 284 U. S. 47, 50;
United States v. *Lowden*, 308 U. S. 225, 230.

Particularly important cogs in the legislative set-up to carry out the policy are Section 15a and Section 13, which respectively require the Commission in prescribing just and reasonable rates to give consideration "to the need of

revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such (adequate and efficient) service" (49 U. S. C. Sec. 15a (2), pocket Supp. p. 114),[5] and give the Commission power to prescribe intrastate rates in order to prevent discrimination against interstate commerce. (49 U. S. C. Sec. 13(3) and (4); pocket Supp. 1, 82; Appendix B, hereto attached.)

In *United States* v. *Louisiana*, 290 U. S. 70, it is shown that these two provisions go hand in hand, one being a necessary corollary of the other if effective action on the Commission's part is to be attained in carrying out this national policy. At pages 74 and 75 of the opinion in that case it is said:

> "By § 416 of the Transportation Act, § 13 (4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This Court has consistently held that this section is to be construed in the light of § 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of § 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return."

A further fundamental unsoundness of appellants' contention here as to inadequacy of findings, therefore lies in their failure to recognize the legislative character of the Commission's action and order in Ex Parte No. 148 and the broad general scope, effect and authority thereof. Here was no case in which more specific findings were required or would have been appropriate. The findings and conclusions of the Commission, which we have summarized

[5] Appendix D, hereto.

above, covered the situation completely. The Commission's report shows that from evidence of a general nature it found the carriers needed increased revenues due to increased expenses during this emergency period; that these expenses were arising in the handling of all kinds of traffic everywhere, including passenger traffic of all kinds; that the passenger traffic should bear its share of the increased cost; that the proposed increased passenger fares would produce $45,000,000 per year and upwards; that this would be an appropriate amount for the passenger traffic as a whole to bear; that the general 10% increase should be spread upon all passenger rates subject to the Commission's jurisdiction, including those prescribed in previous Section 13 proceedings and with specific reference to the very rates involved in this case, referring to them by specific docket number; and that the exigencies of the case did not permit of further refinements such as considering the needs of individual railroads and adjusting their rate schedules separately.

Appellants' Contentions Lack Substance.

To summarize on this question of findings:

The orders of the Interstate Commerce Commission under consideration in this case are all legislative acts and as such they are not subject to restraint or modification by the courts if it appears that in issuing them the Commission acted within the scope of the legislative authority delegated to it by Congress.

Since these orders are admittedly subjected only to collateral attack here, the only concern which this Court need have with respect to findings, if, in fact, it is entitled to concern itself at all with that subject,[6] is to see whether

[6] The purpose of findings is to enable the courts in *reviewing* I. C. C. orders to "examine the evidence" and ascertain whether the Commission's

or not the respective orders contain sufficient in the way of statements or findings to indicate that the Commission acted substantially within the scope of the legislative authority delegated to it.

It appears very definitely and affirmatively in the recitals and terms of the orders here involved that the Commission in each instance was acting well within the scope of its authority. In the 1925 order it not only set forth the quasi-jurisdictional finding of discrimination against interstate commerce, but included several pertinent supporting findings. The same is true of the 1936 order (*Passenger Fares and Surcharges*, 214 I. C. C. 174), and again of the 1942 order, wherein general regulatory control over passenger fares throughout the nation was exercised. In the 1936 order the general level of fares was required to be reduced, the order being accompanied by a voluminous report, with a summary of 14 specific supporting findings, followed by the Commission's conclusions thereon (214 I. C. C. at pp. 253-7). The scope and context of the findings and conclusions shows very positively that the Commission was there exercising its continuing regulatory power over all groups of intrastate rates of which it had previously taken jurisdiction in certain specified cases such as the specific case involved in the 1925 order here, Docket No. 11703, *Intrastate Rates Within Illinois*. (59 I. C. C. 350 and 102 I. C. C. 479.)

Again, in the 1942 order here attacked by appellants (Complaint, Exhibit B), the quasi-jurisdictional findings are present in the order itself, affirmatively showing that the Commission acted well within the scope of its author-

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"findings are properly supported." *Indiana Coal Case*, 294 U. S. 499, 504-5. *Power Reverse Gear* case, 293 U. S. 454, 465, *supra*. It may well be doubted that the question is properly raised, in any aspect, on collateral attack. We find it unnecessary to stand on this point, as the findings here are ample in any event.

ity in carrying out the congressional mandate to permit the maintenance of rates, fares, and charges which will enable the railroads to continue rendering adequate and efficient railway transportation service necessary to the national defense during the present emergency. And again, in the Commission's report covering the freight rate increases as well as the passenger are found statements of the facts and findings supporting the basic or quasi-jurisdictional findings. These findings are intrinsically applicable to both interstate and intrastate rates of which the Commission had jurisdiction, and the order specifically so applied them. So there might be no question about this the Commission made specific references to its orders in previous section 13 cases, including Docket No. 11703, and expressly modified its outstanding orders in those cases, taking care to leave in effect absolutely everything about those orders except what was necessary to permit the 10% increase to be carried into effect by the filing of appropriate tariffs. In effect, the action of the Interstate Commerce Commission in thus amending the 1925 order by ordering a copy of the 1942 order filed in the docket of the 1925 proceeding, was a reaffirmation of the 1925 order in a form amended only to permit the raising of the rate level ten per cent.

The foregoing, we believe, demonstrates effectively the lack of substance in appellants' point as to the inadequacy of findings in the 1942 order. This is further demonstrated by reference to that part of appellants' statement herein entitled "The Application of the Foregoing Authorities to the Findings in the Instant Case." There the only specific complaints made as to lack of findings are these:

1. That there was "no finding of fact showing that the rates before the authorized increase were confiscatory"; and

2. That the findings did not "indicate the 'extent' of the inadequacy of the previous rate structure or 'expected loss' or deficit to be anticipated from the previous rates."

In fine, appellants' contentions narrow down to the proposition that the absence of these specified findings has denied them due process of law. Such is the final assertion in their behalf and they endeavor to give it force by quoting excerpts from the decisions which we have analyzed above, which they characterize as "independent proceedings in equity."

That any finding in the Ex Parte No. 148 order, as to rates being confiscatory, would have been entirely inappropriate and beyond the scope of the investigation in that proceeding is obvious in view of the nature of the proceeding. The carriers in proving their need for increased revenues to meet the huge wage increase and other expense suddenly imposed upon them in excess of $350,000,000 per year had no occasion to attack the previously existing general rate level as confiscatory. The only issue before the Commission was whether or not the carriers would need a general rate increase in order that they might function properly during the war and be enabled to render needed transportation for the nation during the emergency period. The facts found by the Commission showed the need. Authority to make the increase in rates was granted by the Commission precisely as the Congressional mandate required (49 U. S. C. Sec. 1 and Sec. 15a, supra). The Commission in its report said:

> "The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency." (Sheet 48.)

Likewise, there was no occasion for the Commission to make any findings as to the extent of inadequacy of the

then existing rate level or any expected loss or deficit. The Commission found these huge increased costs had been suddenly imposed upon the carriers. These were out-of-pocket costs. The need for more revenue was plain and imperative. The only question was "how much." The Commission in its discretion granted less than was estimated to meet the increased costs, but granted prompt relief.

The finding in Ex Parte No. 148 must be found sufficient even if the appellants here were in a position to raise the point as they might have done by filing a complaint in equity to review the Commission's order. (The State of Illinois was notified and made a party in Ex Parte No. 148.) Had appellants done this, they would have placed themselves in the position of those litigants who were complaining in the several cases which appellants have cited here—they would then have been in a position to raise these questions. Having failed to take that course, appellants must accept the Commission's order at face value, as, indeed, it has been and is being accepted throughout the land.

To hold otherwise would not only do violence to all the applicable principles of administrative law, but would seriously cripple many of the more important units in the national system of rail transportation. Appellee's railroad is among those carriers (whose mileage is more than 30% of the total United States rail mileage) now being reorganized under Section 77 of the Bankruptcy Act. If, as appellants claim, the 1942 order is void on its face, it must follow that all rates purported to be increased pursuant to its authority are unauthorized. A serious transportation crisis would quickly develop. It was to avoid such crises that Congress enacted the statutes to which we have referred.

VIII.

The Claim That the Ex Parte No. 148 Order Does Not Purport to Authorize These Increased Rates Is Disproven by the Plain Terms of the Order, Which Are Confirmed by a Later Order of the Interstate Commerce Commission.

Adopting the devious argument of the *Transit Commission* case, appellants contend the effect of the Ex Parte No. 148 order was merely to withdraw generally Interstate Commerce Commission opposition to increase in intrastate rates. The argument is built up to that point by taking the word "permit" (used in the order) out of its context and giving it a literal and independent meaning. To support their conclusion the false premise is indulged in that there existed some Federal opposition to increases in intrastate rates—an assumption belied by the whole tenor and effect of the Interstate Commerce Commission's report and order.

The Federal Government represented by the agency of Congress fully authorized to act, here determined the necessity for increasing *all* passenger fares, both *inter*state and *intra*state. It went further. It specifically provided for the increase of certain intrastate fares of which it had previously taken jurisdiction by amending its orders previously entered and then outstanding so as to provide for such increase. The amending order was, by its terms, required to be filed in the docket of each proceeding in which those previously entered orders had been made. Such filing having been made, thereby the outstanding orders were modified. This was followed by specific reference to Section 13 cases in which the Commission then held jurisdiction over intrastate rates (including those here involved). Its outstanding orders respecting these rates were singled out as a class from all other outstanding

orders, to make doubly sure the Commission's intention and desire to provide the 10% raise of *intra*state as well as *inter*state rates subject to its jurisdiction.

Surely it is perversion itself to suggest, as is here suggested, that the word "permit" was used to indicate a withdrawal of Federal opposition of some vague kind or other to the proposed increase in these intrastate rates. For that matter, what objection could the Federal agency *ever* have in *any* case against intrastate rates being brought up to, or maintained, on a level of equality with, interstate rates? The provisions of Section 13 (3) and (4) giving it jurisdiction over intrastate rates prove the Commission could only have objections in cases where intrastate rates were being reduced or maintained at a level *below* the interstate rates.

The further conclusion of the New York Judge that the word "permit" was used so that the carriers would be free to make increased fare applications to state regulatory bodies is even less worthy than the first assumption. There was, of course, no permission of the Interstate Commerce Commission needed by any carrier to enable it to make increased rate applications to state authorities.

There is no difficulty in understanding the Commission's use of the word "permit" in the context of its order wherein it amended its previous outstanding orders, when one considers for a moment the mechanics of this rate increase. Ex Parte No. 148 being a general proceeding and having been initiated by the carriers in advance of their filing of any tariffs, the Commission's order itself necessarily could not establish the increased rates and fares. That could only be accomplished by the subsequent action of the carriers in filing new or supplemental tariffs with respect to the very great number of rates and fares in existence all over the country and set forth in numerous

existing tariffs already on file. The carriers' petition in Ex Parte No. 148 was in the form of a request for permission from the Interstate Commerce Commission to file such new or supplemental tariffs naming increased charges. This is shown by the very first paragraph of the Commission's report, which states that the railroads "ask us to make certain orders necessary to enable them to increase their rates, fares and charges." And the order itself points out some particulars as to how the permitted tariffs or supplements may be submitted and filed and the time when they may become effective.

In other words, instead of proceeding as is customary with respect to local or group rate changes by filing tariffs or tariff supplements, and then waiting to see whether or not opposition develops and the tariffs are suspended pending hearing and consideration by the Interstate Commerce Commission, the carriers here proceeded by the other method which we have pointed out had been expressly approved by the Supreme Court in other general cases. That is to say, the carriers sought permission and approval of their proposed tariffs in advance. Hence, the use of the word "permit," a perfectly well chosen word in the situation in which it was used.

The New York judge also fell into error by attaching an undue significance to that part of the recitals in the Interstate Commerce Commission's 1942 order which states that "* * * similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges, * * *." Such applications were necessary as to the great residuary body of intrastate rates and fares of which the Interstate Commerce Commission has never had occasion to take Section 13 jurisdiction. Not all states refused after 1920 to raise

the level of intrastate rates to conform to that of the interstate rates. Those that did not so refuse still have jurisdiction over their own state rates. They will continue to have it unless and until there is occasion to file a Section 13 complaint and obtain a finding of undue discrimination against interstate commerce. Hence the necessity for petitions to state authorities as to a great mass of intrastate rates *not, however, including those as to which Section 13 orders already were outstanding.* The propriety of the recital is therefore evident. Its presence in the order is completely accounted for without involving the wholly mistaken assumption made by the New York judge that it is indicative of an intent by the Interstate Commerce Commission that the carriers would go back to the State Commissions even in the Section 13 instances.

To adopt appellants' contention would render completely ineffective that very substantial part of the Commission's order in Ex Parte No. 148 which authorizes the 10% increase in intrastate passenger fares of which it had previously taken jurisdiction under the congressional mandate of Section 13, Interstate Commerce Act. No less than 22 such cases are listed by docket number in the 1936 order of the Interstate Commerce Commission, and included by specific reference in the 1942 order. Among them is Docket No. 11703, involved here. To so construe this order as to nullify such a substantial portion of it would do violence alike to common sense and the legal principles to which we have referred above.

If any doubt ever existed about the *intent* of the Interstate Commerce Commission's 1942 order, that doubt has been completely dispelled by the Commission's own action through its order of March 24, 1942, in Docket No. 11860, *Montana Rates and Fares*, Appendix A hereto. It is seen therefrom that a Section 13 order entered in 1921 had

required the maintenance of intrastate fares on the same basis as interstate fares in Montana; that in 1938 the Interstate Commerce Commission finding that the State authority then had adopted the same bases of fares as those which it required interstate, vacated its 1921 order because it no longer served any necessary or useful purpose; and that in view of the disparity between the Montana intrastate rates and the proposed increased interstate rates under the order in Ex Parte No. 148, the vacation of the old 1921 Montana order has now been set aside and it has been revived so as to "protect" the Montana intrastate rates and make them subject to the present 10% increase, the same as the interstate rates. The present situation in Montana is specifically found to justify "the continued maintenance and observance of" the 1921 order as modified. If, as appellants claim, the order in Ex Parte No. 148 was merely a permission to the carriers to go back to State Commissions where Section 13 orders were outstanding, no action at all by the Interstate Commerce Commission would have been necessary in the Montana situation, *because there was no outstanding Section 13 order, the original one having been vacated.* But the Commission, by *reinstating* the Section 13 order previously vacated, put the Montana intrastate fares up to the interstate level through the application of Ex Parte No. 148 in precisely the way that these Illinois intrastate commutation fares were increased.

This demonstrates, perhaps more forcefully than anything we might say, the Interstate Commerce Commission's belief and intention as to the validity and effectiveness of its order here in question, as respects its applicability to increases in intrastate rates already within its control under Section 13. There is and can be nothing substantial in appellants' contrary contention.

IX.

By Its So-called Suspension Order the Appellant Commission Attempted to Establish Passenger Fares Insufficient to Meet Appellee's Cost of Rendering the Service and Hence Confiscatory.

The Interstate Commerce Commission found in its 1925 order (Complaint, Exhibit A) that the 20% increase in Illinois intrastate commutation fares thereby permitted would still fail to produce sufficient revenue to fully meet the cost of rendering the service. The complaint herein shows that the expenses necessarily incurred in furnishing this service have greatly increased since 1925; that heretofore appellee has been furnishing the service at a total expense considerably in excess of the total revenues derived therefrom; and that when the complaint was filed (after the effective date of the increased fares here involved) the service was still being furnished at a loss and without any return upon the value of the property used by appellee in rendering the service (Complaint, Sections XIV and XV).

The Court found that the purport and effect of the appellant Commission's order of February 18, 1942, is to prescribe fares for the appellee at the previously existing noncompensatory level and to prohibit the appellee from increasing or modifying those fares unless and until permitted to do so by further order of the appellant Commission at some indefinite time in the future; that the fares thus prescribed would not produce sufficient revenue to meet the cost of the service; that for some years such service had been rendered by appellee at a loss and without deriving any return whatsoever upon the value of the property devoted to the service; and that even with the increase therein made effective March 8, 1942, as authorized by the Interstate Commerce Commission, the appellee is still realizing a loss from

this service and deriving no return whatsoever upon the property investment. (Findings 11-13, inclusive.) The Court concluded that enforcement of the appellant Commission's order imposing these confiscatory rates would deprive appellee of his property without due process of law in violation of Amendment XIV. (Conclusion 5.)

X.

The Passenger Fares Thus Sought to Be Imposed by Appellants Were Properly Enjoined Because of Their Clearly Established Confiscatory Character and Quite Independent of the Other Grounds Amply Supporting the Injunction Order.

The appellant Commission's order (Complaint, Exhibit C), called a "suspension order," undertook to establish these admittedly confiscatory rates "until the period of suspension and any extension thereof has expired." The immediate period of suspension stated in the order was until July 6, 1942. However, that Commission is given authority under Section 36 of the Public Utilities Act of Illinois to extend this suspension period for an additional six months. (Complaint, Section X; Appellant's Jurisdictional Statement, p. 4.)

In *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49-50, where it was shown that rates yielding less than a fair return were sought to be imposed on a temporary basis pending further procedure before the New York Commission, it was specifically held that the temporary character of the rates would not deprive the company of its right to relief at the hands of the court. Referring to the New York Commission's orders prescribing those temporary rates, the Court said (p. 49):

"They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

Again in *Northern Pacific* v. *Department of Public Works*, 268 U. S. 39, where the rates fixed by the Washington State Commission were for an experimental period of twelve months and where the carriers showed the rates so fixed would not yield sufficient revenue to meet fully the operating expenses, the Court, in holding the carriers entitled to an injunction, said (p. 45):

"The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings. If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed. The cases which applied the principle of awaiting the result of an experimental period for untried rates have no application here." (Citing cases.)

Believing these decisions state sound legal principles fully applicable to the instant case, appellee asserts that here is an additional and independent ground upon which the lack of substance in this appeal clearly appears.

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument and appellee respectfully moves the Court to

dismiss this appeal, or, in the alternative, to affirm the decree of permanent injunction entered below.

CHARLES M. THOMSON,
Trustee of the Property of
Chicago and Northwestern
Railway Company,
Plaintiff-Appellee.

By WILLIAM T. FARICY,
NYE F. MOREHOUSE,
P. F. GAULT,
His Attorneys.

June 9, 1942.

APPENDIX A.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 24th day of March, A. D. 1942.

No. 11860.

MONTANA RATES AND FARES.

In the Matter of Intrastate Rates and Fares of the Chicago, Burlington & Quincy Railroad Company and Other Carriers in the State of Montana.

It appearing, That the Commission on March 31, 1938, made its order in the above-entitled and other proceedings therein listed requiring the parties to the respective proceedings to show cause on or before May 4, 1938, why orders previously entered in such proceedings and still outstanding should not be vacated and set aside in so far as they require the continued maintenance and observance of the rates, fares, charges, allowances, rules, regulations, or practices separately prescribed in said outstanding orders;

It further appearing, That with respect to this proceeding the said order of March 31, 1938, had reference to the outstanding order of January 11, 1921, as modified, made upon report appearing at 60 I. C. C. 61, which latter order prescribed for the removal of the unlawfulness therein found, the interstate bases of fares for the transportation of passengers, of excess-baggage charges, and of surcharges upon passengers traveling in sleeping cars and parlor cars, for application on intrastate commerce within the State of Montana, because the interstate bases in effect when said order of March 31, 1938, was made were on the same or practically the same bases as required by State authority, and that therefore the continuance in force and effect of said outstanding order served no necessary or useful purpose;

It further appearing, That no return was filed by any party to said order of March 31, 1938, whereupon the Com-

mission on June 6, 1938, made its order in all those proceedings by which all said outstanding orders, in so far as they required such continued maintenance and observance, were vacated and set aside;

It further appearing, That the railroad carriers operating within the State of Montana, by petition solely in this proceeding filed February 4, 1942, inform the Commission that through oversight these petitioners failed to show cause in response to said order of March 31, 1938, why said order of January 11, 1921, should not have been vacated and set aside, and aver that for this reason the intrastate passenger fares in Montana are technically no longer protected by an outstanding order made pursuant to section 13 of the Interstate Commerce Act; that by order of January 21, 1942, in Docket Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, this Commission approved increased passenger fares, reflecting an increase of 10 percent over then present fares, as proposed by railroads throughout the United States, which increased fares became effective February 10, 1942, on interstate traffic, and that said order of January 21, 1942, modified all outstanding orders to the extent necessary to permit the increase authorized by said order of January 21, 1942, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that, inasmuch as said order of January 11, 1921, has been vacated, and a statute of the State of Montana prescribes a basis for maximum fares which would be exceeded if the Montana intrastate fares were all increased by 10 percent, petitioners pray that the Commission reinstate said order of January 11, 1921, upon the ground that the latter order was vacated improvidently by said order of June 6, 1938;

It further appearing, That no reply to said petition has been received from any party, although the petition was duly served upon all parties by these petitioners by mailing a copy to each of them;

And it further appearing, That the existence of said statute affords good cause for the continued maintenance and observance of said order of January 11, 1921, as modi-

fied, and that therefore said order of June 6, 1938 was made improvidently:

It is ordered, That said order of June 6, 1938, in so far as it relates to this proceeding, be, and it is hereby, vacated and set aside; that said order of January 11, 1921, as modified prior to June 6, 1938, is restored and reinstated; and that this order shall take effect April 4, 1942.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX B.

Interstate Commerce Act, Section 13.

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

APPENDIX C.

Report of the Commission.

By the Commission:

In petitions filed in December 1941, heard in this proceeding, the carriers by railroad subject to our jurisdiction ask us to make certain orders necessary to enable them to increase their rates, fares, and charges in interstate or foreign commerce by 10 per cent, except by specific amounts the rates on coal, coke, and iron ore. Similar petitions were filed on behalf of certain common carriers by water.

Hearing was held in St. Louis, Mo., beginning on January 5 and ending January 9, 1942, and the case was submitted to us upon briefs and oral argument on January 14.

Petitioners indicated an intention to make like increases upon intrastate traffic. All the States were notified by us of the pendency of the proceeding. In accordance with section 13(3) of the Interstate Commerce Act we sought the

cooperation of the State commissions. Their committee, consisting of Commissioners McConnaughy of Ohio, Eichhorn of Indiana, Darby of South Carolina, Jourelmen, Jr., of Tennessee, Murphy of South Dakota, Keshlear of Iowa, Betts of Arizona, and Riley of California, sat with us throughout the hearings and oral argument, and has conferred with us as to the determination of the issues. We are authorized to state that a substantial majority of the members of the cooperating committee are in general accord with the conclusions expressed herein.

Wage Increases and Proceedings Leading Thereto.

The rail carriers' request was made shortly after agreements involving certain increases in the wages of railroad employes became effective. Proposals for wage increases were made in May 1940, followed by counter proposals and proposed changes in rules initiated by certain carriers, and further proposals by employe organizations in 1941 for the increase of all basic wage rates. Attempts to mediate the disputes failed and a strike of operating and non-operating employes was called effective on specified days in September 1941.

An Emergency Board named by the President held extensive hearings, and, on November 5, 1941, submitted its recommendations to the President. The railways signified their willingness to accept the recommendation. Some of the board's major recommendations were rejected by the groups of employes, and on November 13 the operating group issued a strike call, effective in December.

Following the failure of further unsuccessful negotiations by the parties, and further hearing before the Emergency Board, that board attempted mediation, and evolved the agreement already referred to. It provided for a wage increase of 9.5 cents per hour in basic hourly wage rates, equivalent to an increase of 76 cents per day, to employes of the five operating organizations; an increase of 10 cents per hour, or a basic daily wage increase of 80 cents in basic hourly wage rates, to employes of the fourteen non-operating organizations. The pay increases were to become effective December 1, 1941, and the employes were to receive

retroactive pay for the period from September 1 to December 1, 1941, based upon the wage recommendations set forth in the Emergency Board's original report of November 5, 1941. The agreement provided that the wage changes described were to be increases in basic rates of pay and not temporary, and it assured a vacation of six consecutive work days with pay for all employes in the fourteen non-operating organizations of the railroads represented at the hearings before the Board. The recommendation in its report of November 5 of a basic minimum wage scale of 40 cents per hour for employes of certain short lines was reaffirmed.

Petitioners' Proposals.

Class I railroads.—The first petition was filed December 13, 1941, by substantially all class I railroads of the United States and some railroads of other classifications. They request authority to increase immediately their freight rates and charges and passenger fares in the manner and to the extent therein set forth. The increases sought are generally stated as follows:

Passenger.—A uniform increase of 10 per cent in all fares, including rates and charges for milk and cream and articles grouped therewith as published in passenger tariffs, except that no increase will be made in fares specially published for application to members of the military or naval forces of the United States traveling on furlough, and no increase will be made in the amounts published as extra fares applicable in connection with particular trains.

Freight.—A uniform increase of 10 per cent in all freight rates, except those on coal, coke, and iron ore; and in accessorial charges with certain exceptions. The proposed increase on the excepted commodities, which were in cents per 100 pounds, and the proposed rules, are shown in detail in appendix 1 to this report.

Petitioners assert that they recently incurred certain unavoidable and continuing increases in their operating costs, which are so substantial that, unless promptly offset by increases in revenues, their financial resources will be seriously impaired and their ability to continue to render adequate and efficient railway transportation service will

be greatly endangered. Reference is made to the increases in wages for all class I railroads, estimated to amount to approximately $311,711,000 per year, resulting from the mediation agreements referred to previously.

In addition to the increases in wages described, petitioners state that they will find it necessary to make readjustments in the wages of employes not covered by the mediation agreements, which will result in increasing their operating costs probably more than $20,000,000 a year. There have been advances recently in the prices of many materials and supplies, and the petitioners expect such higher prices will continue or be increased in the future. The amount of the total advance in prices, while not estimated, is said to be substantial.

Upon recommendation of the War Department the petitioning railways are taking precautionary measures to safe-guard their properties and operations during the continuance of the present war, and, as a result thereof, are said to be confronted with increases in their operating costs of not less than $30,000,000 a year. As the result of the war they are being called upon frequently, in connection with the transportation of troops and property for the United States, to perform many special and unusual services, which add to their costs, and for which no compensation is included in the normal tariff charges on such movements. No approximation is made of the amount by which operating expenses will be increased as a result of the situation described.

The petitioners allege that because of the increases in expenses referred to their rates, fares, and charges are insufficient to yield revenue over and above operating costs necessary to insure their ability to continue in the public interest the adequate and efficient service contemplated by section 15a of the act. If the increased costs referred to had existed during the year ended September 30, 1941, the aggregate net railway operating income of class I railroads for that period would have exceeded their fixed charges for the same period by only a relatively small amount, and many of such railroads would not have earned their fixed charges, according to the petition.

These increased operating costs are described as general in character and as applying to all traffic handled by them. Petitioners assert that the only practical method by which they may obtain the necessary added revenue is by a general percentage increase in all their rates, fares, and charges, with certain limitations and modifications as to particular classes of traffic. They accordingly pray for authority to make the increases hereinbefore described, including international and joint rail-and-water and rail-and-truck rates, fares, and charges.

It is alleged that the increases proposed will not result in rates, fares, or charges that are unreasonable, or in a loss of traffic to an extent that will deprive them of a substantial net increase in revenue. Such increases the petitioners assert, are necessary to enable them to continue to provide the adequate and efficient transportation service demanded in the interest of the general welfare and national defense.

On the basis of traffic, both interstate and intrastate, moved during 1941 and moving when the petition was filed, allowing for readjustments required by commercial and traffic conditions, petitioners estimate that the proposals will yield increased revenue for all class I railroads of about $356,956,000 per year.

We are asked, after suitable investigation, speedily to determine and find that the proposed increased rates, fares, and charges will be just and reasonable, and not in excess of the maximum necessary in the public interest to enable petitioners to continue to provide the transportation service contemplated by law and required by the present national emergency; and to make such findings and orders as would permit petitioners without our further order to make revisions in the increased rates which we might authorize, in the manner and to the extent outlined in the petition. In order to make such authorization effective, it will be necessary for petitioners to have permission to make such increases effective on short notice, by simple forms of supplements to existing schedules. It will also be requisite that we modify our outstanding orders to the extent necessary to permit them to make effective the increases approved by

us, and to enter orders authorizing departures from section 4 of the act.

Short line railroads.—The American Short Line Railroad Association for its members supports the petition of the class I and other carriers, and asks for similar authority.

The allegations as to the increase in operating expenses and need for relief by way of increases in freight rates and charges and passenger fares, are similar to those in the original petition of the class I roads. Some of these petitioners claim to be experiencing a lessening in their volume of traffic, caused by a shifting from commercial to government traffic, and inability of industries served by them to obtain materials and supplies.

Such of the Short lines as are subject to Investigation and Suspension Docket No. 11, *The Tap Line case*, pray that we modify our order of July 11, 1922 (Seventh Supplemental Order), prescribing a scale of switching allowances, so as to increase such allowances by the amount of any increase authorized applicable to lumber and forest products, so that petitioners may retain their proportionate share of the additional revenues resulting from such increases.

Other petitions in intervention.—Subsequent to the filing of the original petition of class I railroads, a number of petitions were filed by carriers of property by rail or by water, based upon the same general allegations as to their financial needs, brought about by increases in costs due to recent wage increases, advancing prices of materials and supplies and the adverse effect of war conditions upon operating efficiency and economy. The relief sought is in general the same character and extent of authorization for the interveners as we should accord to class I railroads, with which the interveners connect or compete. The following are the petitions referred to:

Supporting Petitions.

Supplementing petitions supporting the initial petition, petitions have been filed by the Southern Traffic League and the American Trucking Associations, Incorporated.

The league recognizes that the railroads are facing an emergency and may need additional revenue as alleged. Its petition in addition to making certain suggestions as to our procedure, urges us to grant increases only to the extent justified by the evidence, and to require publication of any approved increases only as emergency charges with an expiration date; and that we shall thereafter continue the proceeding with further hearings to permit interested parties to be fully heard respecting the lawfulness of the general increase as applied to particular traffic, and whether the increase should be in flat amounts or *per centum*.

The American Trucking Associations, Incorporated, composed of fifty affiliated associations throughout the United States, calls attention to the relation of motor-carrier economics to the proposed rail-rate increases in considering the issues herein.

Value of Common Carrier Railway Property.

The petitioners do not regard any issue as to the fair value of the property as necessarily involved.

We have received in evidence data prepared by our Bureau of Valuation, as to the elements of value as defined in section 19a of the act, of the property used in common-carrier service by the railways of the United States, as of January 1, 1940, the latest available date for such a study.

From our study of the record, it does not seem necessary for our determination to enter into a discussion of the value of the common-carrier property of the petitioners. The proceeding has not taken on the aspects of a "fair return" case. As stated by counsel for the class I petitioners at the opening of the hearing, this is a revenue case, not a rate case.

Financial Evidence.

For petitioners generally.—In 1940, and especially 1941, the class I railroads experienced a recovery in gross and net earnings from the generally lean years 1931-1939. Complete returns for the calendar year 1941 were not available at the hearing, but petitioners presented the financial results of operation for the year ended October 31, 1941, in

comparison with those of preceding years. In brief, the results were as follows:

Item	Average 1921–1930 (Millions)	Average 1931–1940 (Millions)	Calendar year 1940 (Millions)	Year ended Oct. 31, 1941 (Millions)
Operating revenues, total	$5,960	$3,721	$4,297	$5,167
Operating expenses, total	4,503	2,769	3,069	3,502
Taxes	351	304	396	536
Net Railway operating income	999	519	682	997
Net income	619	40	189	495

The net railway operating income of $999,500,000, which is the net after deducting operating expenses and taxes, but before deduction of fixed charges, for the 1941 period is nearly the same as for the ten-year average 1921-1930. A reduction of one billion dollars in expenses almost offsets the decline in revenues and growth of taxes. The net income for the 1941 period compares unfavorably with the average net income of the 1921-1930 period.

We may observe that while taxes have been deducted in stating net railway operating income in the foregoing table, we have held that

> * * * railway corporations should, like other corporations, pay their federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it (them) to retain the designated fair return over and above the tax.

Reduced Rates, 1922, 68 I. C. C. 676, 683. Included in the item "taxes" in the foregoing table, for 1941, is approximately $171,000,000 of Federal income taxes.

The number of revenue ton-miles in 1941 was greater than the average for the 1921-1930 period and exceeded even the 1929 peak, but the revenue per ton-mile continued to decrease generally after the 10 percent reduction in freight charges in 1922. It was 0.944 cent in 1941 (year ended September 30), compared with 1.11 cents for the 1921-1930 average, a reduction of 15 percent. The reduction was in part the result of rate changes and due in part to other causes. The number of revenue passenger-miles did not reach the average for the 1921-1930 period in 1941

(year ended September 30), and the revenue per passenger-mile for 1941 was less by 40 percent.

The revival of net earning power of the railroads in 1941, was checked near the end of the calendar year by the increase in the rates of pay of railroad employes hereinbefore described. The annual cost of the higher basis of pay effective December 1, 1941, was estimated as follows by a witness for the carriers, who assumed an employment equal to that for the calendar year 1941. This applies to railroads of class I.

Operating employes covered in agreements	$69,250,000
Nonoperating employes " " "	199,874,000
Increase in payroll taxes	16,147,000
Vacations to nonoperating employes	26,500,000
Probable increase to other employees	20,000,000
Total	331,771,000

This estimate makes no allowance for the fact that the payroll is chargeable in part to capital account. Since as expenses increase profits decrease, income and excess profits taxes are thereby reduced. It is probable that in the aggregate the decrease in income taxes on this account is nearly equal to the additional payroll taxes, but this would vary greatly among individual carriers. The increases to employes not covered by the agreements have not yet been incurred. Whatever may be the outcome as to these two items, it is clear that some $300,000,000 has been added to the operating expenses of the class I railroads for a year like 1941 because of the advance in wages. This is 5.81 percent of the operating revenues of the 12 months ended October 31, 1941.

Petitioners estimated the increase in operating revenues which would result from the proposed increases in rates and fares at $358,811,000 for a volume of traffic equal to that of 1941. The estimated amount and percentage of the proposed increase in revenue may be summarized under the following heads, but it is to be remembered that the traffic assumed for the purpose of the estimate is that which was carried in 1941. The petitioners have made no

similar detailed estimate as to the volume or character of their future traffic.

Item	Estimated amount of 1941 revenue	Estimated amount of increase from proposed charges	Percent of increase expected
1 Bituminous coal	$512,392,000	$18,491,000	2.5
2 Anthracite	13,879,000	2,588,000	2.25
3 Coke	33,841,000	1,076,000	3.2
4 Iron ore	120,620,000	8,583,000	7.1
5 Total, 4 groups	1,010,732,000	30,737,000	3.0
6 All other freight revenue	3,517,049,000	281,364,000	8.0
7 All commodities	4,527,781,000	312,102,000	6.9
8 Passenger revenue	508,234,000	45,741,000	9.0
9 Milk revenue	9,678,000	968,000	10.0
10 All other revenue	279,307,000	[1]	
11 Total operating revenue	5,325,000,000	358,811,000 [2]	7.1

[1] None specified.
[2] Computed without regard to Item 10.

With respect to the efficiency and economy of the operations of the petitioners, we have a showing over a series of years of increased capacity of equipment and freight trains, of larger numbers of gross ton-miles per train-hour and per ton of fuel consumed, and of reduction in expenses per ton-mile.

The statistical presentation by petitioners was taken together for all districts, the same percentage of increase in charges being requested for all districts, except for the special treatment of coal, coke, and iron ore. Data of record permit of a test as to the extent to which this is justified. For the calendar year 1941 the net earnings of class I railroads, by regions, were as follows:

	Net railway operating income Calendar year 1941
Eastern district	
New England region	$35,663,397
Great Lakes region	164,378,811
Central Eastern region	197,767,415
Total	397,809,623
Southern district	
Pocahontas region	92,042,384
Southern region	138,673,395
Total	230,715,779
Western district	
Northwestern region	123,862,011
Central Western region	167,114,840
Southwestern region	80,000,653
Total	370,977,504
Total—All districts	999,502,906

Reference also was made to advances in prices of materials during the year 1941 of 9.8 percent, and further rises in material prices in 1942, and to certain extraordinary expenses amounting to perhaps $70,000,000 expected to be incurred in connection with protecting railway property against war sabotage. The probable need of financing the cost of acquiring as many as 144,000 new freight cars and other equipment during 1942, requiring an estimated $150,000,000 outlay for installment and interest payments in 1942, was emphasized. Maintenance also would have to be continued at a reasonably high level in 1942 because of the unusual traffic demands.

The carriers were unable to supply information as to the extent to which their revenues would be depressed in 1942 on account of the rate concessions which must be made on traffic over land-grant routes and routes competitive therewith. Heavier loading of all freight traffic per car in war time partially off-sets the effect of the land-grant deductions on a part of the traffic. The average load measured in per loaded freight-mile was 28.4 for the 11 months ended with November 1941 compared with 27.7 one year earlier.

Notwithstanding the prospect of increased traffic emphasized by carriers as the cause of probable heavy additional expenditures in 1942, as previously suggested, they make no estimate of the probable effect of the increase in traffic on their net revenues.

Increased revenues from expected greater traffic volume.—Although not part of petitioners' case, it seems appropriate to inject here a discussion of the estimate submitted by one protestant as to the increase in revenues which could be expected because of the prospective greater volume of traffic due to war needs. Briefly, the estimate is that if revenues increase on account of greater traffic to the extent of 10 per cent over 1941, the net railway operating income would be $849,895,455 for 1942 without an increase in rates or fares, and if the revenue increase is 20 per cent, the net railway operating income would become $995,262,571. Such operating results would permit of a coverage of fixed charges by a substantial margin, if these be con-

sidered as actually accrued, or by a wider margin if diminished by the probable effect of railroad financial reorganization. In the constructive income account allowance was made for the higher wage level in 1942, but no specific allowance was included for higher prices of materials. However, it was developed that no allowance had been made on the principle that, other things being equal, an expansion in business tends to increase revenue at a faster rate than the growth of expenses. Thus, according to petitioners' exhibit, from 1940 to 1941 (year ended October 31) the revenues increased by 20.3 per cent and the expenses only 13.3 per cent. From 1939 to 1940 the revenues increased by 7.5 per cent and the expenses 5.9 per cent. An initially favorable response of net revenues to a growth in traffic may be modified by necessary rehabilitation expenses in later years.

The railroads criticized this protestant's exhibit in detail. The protestant then submitted supplemental estimates of net railway operating income, giving effect to the criticism, of $823,755,178 if revenue increased by 10 per cent, and $966,580,795 if increased 20 per cent, both without increases in rates or fares. The resulting net incomes were computed as $379,117,846 and $521,943,463, respectively.

The supplemental exhibit also estimates on the basis of the volume of traffic in 1941, the added revenue estimated by carriers to accrue from their proposal would raise the net railway operating income to $1,100,137,742. If a growth of traffic increased the revenues by 10 per cent, this result could be achieved, according to the exhibit, by a 5.7 per cent increase in freight rates generally (other than on coal, coke, and iron ore rates), and if revenues were increased by 20 per cent as a result of the increase in tonnage, an increase of 3.8 per cent would be needed. Both these estimated percentages were in addition to the requested increases on coal, coke, iron ore, passengers, and milk.

Proposed increase effect on rate of return.—The Louisville and Nashville Railroad Company submitted a partly estimated statement of financial results of operation for class I railroads of the southern region for 1941, after allowing for the higher wage basis, increased revenues from proposed increases in rates and fares, and an as-

sumed deficiency in depreciation charges. The rate of return was 4.37 percent on a rate-making value of $2,282,256,298 (adjusted, but not recommended by the witness), 3.85 percent on book investment, and 4.33 percent on book investment less accrued depreciation. The purpose was to show that the proposed increases in charges would not result in an unreasonably high return. Without the questionable deduction for alleged deficiency in depreciation charges, these tax-free rates of return would have been 6.08 percent, 4.36 percent, and 4.91 percent, respectively. These percentages are computed without any allowance for the effect of increased traffic in 1942; but, on the other hand, no adjustment was included for possible increases in prices of materials and supplies and for other increased cost of operations during the war period, in addition to the wage increase.

The State regulatory commissions of eight southern States in this connection directed attention to the increase in gross and net earnings of class I railroads in the southern region in the first 10 months of 1941 compared with the same period in 1940, with an alleged return of 7.05 percent on a certain rate-making value stated in their exhibit. There was objection to the use of this value.

American Short Line Railroad Association.—A statistical exhibit of this association gives condensed income accounts for railways other than class I for the years 1930 to 1940. For the line-haul class II carriers there was a deficit in net income for each year of this period, except 1936, 1937, 1939, and 1940; and for line-haul class III carriers there was a deficit in every year. More favorable results are shown for switching and terminal companies, for which a net income appears in every year, 1930-1940. On the other hand, for electric railways reporting to us a deficit is shown for every year except 1930.

Traffic Evidence.

General.—The petitioners are not attempting to obtain compensation for increased wages amounting to about $90,000,000 accrued in 1941, but they seek increases sufficient to cover additional costs accruing thereafter. As

the added expenditures described are incurred by both passenger and freight operations, the position taken is that increases should be borne by both kinds of traffic, and by every type of service save those excepted from the proposals. A virtually uniform percentage increase was favored by the railroads as the most practicable and quickest method of obtaining greater revenues. Because of the urgency confronting the petitioners, their traffic executives were of the opinion that they could not work out detailed increases in cents per 100 pounds for application on specific traffic, and that it was not practicable to attempt to obtain a substantial part of the needed revenue by advancing depressed or competitive reduced rates to the maximum reasonable bases heretofore prescribed by us, although competition with motor or water carriers might no longer be potent. Protracted negotiations with shippers and litigation were likely from any such attempts. Since previous general increases, the railroads have conducted analyses to discover where the rate structures now repel or impede traffic, and made corrections by raising or lowering the rates. It was represented that the carriers desire to keep rates as responsive to commercial necessities as conditions reasonably will justify.

The testimony of the traffic expert of the petitioners is that the increase sought, if 10 percent should be authorized, will produce substantial additional revenue, but not more than about 8 percent, judging from experience with previous general increases. This estimate contemplates that increases shall be made effective in intrastate fares and rates, corresponding with those proposed interstate, which will contribute a material but unknown proportion of the total increment to revenue.

The rail petitioners lay stress on the greatly improved economic condition of the country, and the probability that the need for transportation service will continue to grow for a long period and will be reflected in demand for services by railroad. Indicative of the extent to which the Government and shippers depend upon railroad service, in 1941 the petitioners transported about 470 billion ton-miles of revenue freight, which exceeded by 5.1 percent

the previous record made in 1929. The railroad petitioners represent that the present circumstances are such that the increases herein proposed will have no unfavorable effect upon the volume of traffic to be handled: some may be diverted, but not as great an amount as was lost after the general increases of four years ago under dissimilar conditions.

Because of war-time conditions, with diminished truck and water competition, coupled with greater demands for transportation, the railroads foresee no likelihood of competitive conditions compelling a reduction in rates. A large volume of transcontinental traffic has been, and is being diverted from the Panama Canal route to the railroads; but the railroads have made no estimate of the increased revenue which they will derive because of such lessened intercoastal competition.

No surplus of transportation exists. All railroad facilities are in use today or held in reserve ready for use. The railroads are endeavoring to enlarge their facilities and supply of locomotives and cars, in order to meet the swelling volume of traffic developing from the emergency. This program entails heavy expenditures. In order to function efficiently, and to meet the rising and new costs imposed upon them by war conditions, the railroads say that they should be permitted to earn revenues adequate for those purposes, so that they may continue to perform their share of the country's requirements in the present crisis. To this general statement little or no exception was taken by anyone during the course of the hearing. Compare section 15a (1) of the act and the National Transportation Policy.

As to the reasonableness of the rate basis, when the component rates are increased as proposed: in 1941 the effective rates produced 9.42 mills per average ton-mile of revenue freight. If that average yield were increased by 10 percent, or to 10.36 mills, it would be less than the average received by the railroad petitioners during the years 1929 to 1932, inclusive, when operating expenses and wage scales were much lower than at present.

The proposal of the class I railroads contemplates the application of the proposed increase to every published rate or factor, whether presently effective or temporarily

inoperative because held in abeyance by another rate bearing an expiration date or suspended for a period by order of the Commission, so that if and when such rates become effective they would include the general increase. By increasing every rate or factor the petitioners would avoid the difficulties of a published rule providing for the application of combination rates.

If the increase is granted, carriers will proceed immediately to restore established relations and differentials in rates. To this end they suggest that the Commission and railroads set up special committees. A special committee of traffic executives set up by the railroads to deal with interterritorial adjustments is referred to later in this report.

Agricultural products.—Petitioners, in support of their assertion that economic conditions of agriculture are now such that it can well bear the proposed increase in transportation rates on its products, cite the December 1941 issue of "The Agricultural Situation," a publication of the Bureau of Agricultural Economics, United States Department of Agriculture, in which the total cash farm income is estimated at 11.2 billion dollars for 1941, compared with 9.1 billions for 1940 and 8.7 billions for 1939. In the general increases of 1938, an increase of but 5 percent was authorized on agricultural products, while greater increases were permitted on practically all other traffic.

It is intended to renew as they expire the rates on farm commodities in the West at present on an emergency basis.

Coal and coke.—Petitioners' proposals for specific increases upon coal and coke are said to take into account a fair relation between the increase on these commodities and the percentage increase proposed on all others except iron ore. Coal and coke have become increasingly competitive with other fuels or forms of energy, and the railroads state that there is a limit beyond which they can not go in making increases at this time. The measure of present rates and competitive conditions are such that smaller increases are proposed to be applied on coal and coke than on other traffic, but the petitioners do not desire to place an undue burden on the latter.

Rates on coal and coke always have been treated separately from those on other commodities generally, and they are treated so in the present proposals for the purpose of preserving competitive relations between the producing groups, outstanding of which are the relations of many to the southern Illinois base group. Therefore, it is proposed to increase the rates by specific amounts per ton, except the following: On coke all west-bound transcontinental rates and rates from Utah to Pacific coast points the proposed increase is 10 percent, which would yield much more than the specific amounts of 10 cents or less per net ton proposed on coke in western territory. The justification for this exception is merely a statement that these coke rates are grossly inadequate. Only these coke rates, of all throughout the country, are singled out for exceptional treatment because supposedly inadequate in amount.

The greater increase proposed on coal and coke in western territory, including Illinois, than in eastern and southern territories is sought to be justified because the need of revenue is alleged to be greater in western territory, and because of the competitive situation which exists in eastern territory. Earnings in that part of the western district where coal tonnage is heaviest have been inadequate, in proof of which carriers say that receiverships and trusteeships are more numerous there than in other sections of the country.

Iron ore.—Somewhat similar conditions to those applicable to coal and coke have led the petitioners to ask approval of increases in specific amounts smaller than would be yielded by a 10-percent increase. While the earnings of one ore carrier must be high, petitioners contend that a rate increase is needed, because unless that carrier obtains the increase the other ore-carrying lines in the same territory can not get it although they may need it to meet the wage increases.

Accessorial charges on freight.—As set forth in appendix 1, no increase is proposed on certain charges of this character. Petitioners can not estimate the revenue they would derive from the increase on the charges affected.

Iron-ore tonnage has fluctuated widely—almost wildly—from year to year, because of which fact the ore-carrying

petitioners urge that a higher rate of return is justified for them than for railroads engaged in the handling of general and more stable traffic. They assert that in depression years their earnings fall off sharply, leaving them in poor financial condition.

Passenger Fares and Passenger-Train Services

As stated, no increase is sought in the fares for members of the armed forces traveling on furlough, or in the extra fares applicable on particular trains. The latter fares are excepted for the reason that the services for which they are charged are not directly affected by the recent wage increases. No authority is sought to make effective any increases in the charges for accessorial or allied passenger-train services, such as handling baggage or excess baggage, switching loaded or empty passenger or baggage cars, moving special trains, parking passenger or baggage-car equipment, transporting passenger automobiles, motion picture films, newspapers and periodicals, invalid chairs, and burial cases; and transferring passengers between stations in the same city.

The history of the passenger fares, traffic, and revenues of the railroads in the last several decades may be found in *Passenger Fares and Surcharges*, 214 I. C. C. 174, and *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, and will not be restated. The basic fares generally in effect throughout the country when the petition was filed were: In sleeping and parlor cars, one way, 3 cents per mile; round trip, in the East, except locally in New England, a descending scale from 3 cents per mile for the shorter hauls to 90 percent of 3 cents at 900 miles; in the South, 30-day tickets 2.25 cents, 6-month tickets 2.5 cents; in the West, 60-day tickets 2.25 cents, 6-month tickets 2.75 cents; in coaches, one way, 2 cents per mile in the East and West, and 1.5 cents in the South; round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West, and 1.35 cents in the South.

The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars

and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, the lowest rate per mile in railroad history. The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 percent less than in 1930, but the number of passenger-miles was 2.82 percent greater and the average-mile revenue 35.4 percent less than in 1930.

Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles.

The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. The former based his opposition upon the belief that increased fares would discourage travel by rail and would not result in increased revenue to the carriers. The latter, for many years a student of transportation economics, presented data to show that since 1920, when the last general increase in passenger fares throughout the country became effective, increased fares usually resulted in reduced revenues, and reduced fares in increased revenues. He is convinced that the increase now sought will have the same effect.

Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render

adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.[3]

All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.

The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed.

As pointed out, the petitions of the carriers do not seek to increase the charges for accessorial or allied passenger-train services, certain of which we have named above. Accordingly, the authority granted in our order of January 21, 1942, above referred to, including permission therein to publish and file the increased fares on 10 days' notice, made no reference to charges for such services. Nevertheless, many of the tariffs filed under the purported authority of that order also included increased charges for the accessorial or allied services in addition to increased passenger fares. We have suspended the effective date and entered an order of investigation as to such increased charges. The matter is now pending.

An increase of 10 percent is proposed in the rates and charges on milk and cream, and articles grouped therewith,

[3] The rule of fractions provided that when the total increased fares are less than $1, fractions of less than 0.5 cent shall be dropped and fractions of 0.5 cent or greater may be increased to the next whole cent, and that when the total increased fares are more than $1, such fares shall end in 0 or 5, but that no more than 2.5 cents shall be added to the present fares as increased by 10 percent in order to make such total fares end in 0 or 5.

as published in passenger tariffs. Usually these commodities are carried on passenger trains. This rate proposal will be considered later herein. No specific evidence in support of the proposal as to milk and cream was offered by petitioners.

* * * * * * *

1941, were generally priced to give much higher yields. The yields were from 5 to over 10 percent for a group of roads (not under reorganization) operating more than 41 percent of the total mileage of class I railroads.

Interests Supporting Petitioners

Numerous producers, manufacturers, and representatives of industrial and commercial organizations throughout the country presented testimony and endorsed in principle the claim of the rail carriers as to the urgent necessity for increased revenue. The position of the National Industrial Traffic League is typical of others who support the propositions that it is vitally essential and in the public interest that the transportation system shall be maintained at its maximum operating efficiency during the war emergency; that increased rates be permitted to become effective promptly; and that special treatment is justified in the light of transportation and economic conditions as between rates on certain commodities, either in the method of applying the increase, or even to the extent of exempting commodities from any increase.

Position of Governmental Bodies

Office of Price Administration.—This agency takes no position with respect to the general increase sought. It was declared that the particular problems with which this agency is most concerned herein are those which may result from rates on individual commodities, which were not named, rather than from a general increase.

Following discussion with the Office of Price Administration and others the class I applicants undertook to set up a committee composed of traffic executives, for the

purpose of considering and passing upon requests by shippers, and by state and federal governmental bodies, for readjustments and corrections necessitated by present or changed conditions. We are assured that the action of this committee will be prompt, and will be along lines intended to facilitate the even flow of commerce and preserve the industries of each section in fair competition, as far as may be possible consistent with the spirit of our findings. It is fair to say that upon this record many of the protestants have stated that they are skeptical of the results of the formation of this committee. Nevertheless, the utility of such a committee to which those interested may have opportunity to resort informally is clear, if the functioning of the committee shall be prompt and along broad lines.

Bituminous Coal Consumers' Counsel.—The representative of this agency authorized by statute to appear on behalf of consumers of coal, disclaimed intention to take any general position for or against the proposed increases as a whole. He expressed general approval of several of the proposals and called attention to some matters of public interest particularly affecting the coal rates.

He asserted that for the first time in the last ten years the revenues of the railroads have reached a point where the question of a fair return on investment is in issue. Reference is made to a return of 5.75 per cent found in *Reduced Rates, 1922, supra*, to be a fair return, and to our statement in the report therein as to Federal income taxes previously quoted in this report. The proposal of generally lower increases on coal than other commodities was approved, and it was declared that coal has carried a large part of the transportation burden through the depression years and should not be required to bear the same amount of increase as other commodities. Various suggestions were made by the Consumers' Counsel as to details of the proposals, which have received our consideration.

The position taken by the Secretary of Agriculture and by regulatory commissions and other officers and agencies of various states will be stated later.

Protests Against Petitioners' Proposals

General.—A large part of the testimony adduced by the protestants was directed to the question which has been encountered in virtually every preceding general increased-rate case, whether the additional revenue sought shall be obtained by the imposition of a percentage or varying percentages upon traffic generally, or shall be derived by means of the addition of "flat" or certain amounts to the going rates. Subsidiary to this latter proposition is the suggestion often made that if a percentage increase is applied there shall be specified maximum amounts of increase as to particular commodities.

As may be gathered from our past reports where we considered similar contentions, the controversy is really between the shippers who are located at considerable distances from their markets and those who have markets relatively close. Distance alone generally imposes a handicap on the long-haul shipper, since the rate he pays exceeds that paid by his short-haul competitor. The long-haul shipper looks at the difference in the two rates, and sees in a prospective increase of each rate by means of a uniform percentage a widening of this rate difference in cents per unit of transportation. This he regards as an important factor in his competition with the short-haul producer, and he naturally opposes the use of the uniform percentage method of increasing rates, or seeks a maximum limit upon the amount of the increase. The short-haul shipper, on his part, regards his shorter distance as an advantage to which he is entitled, and urges with force the principle that the adjustment of rates with reference to cost of service requires increased expenditures, such as those which form the basis for this case, to be distributed ratably among the rates so as to represent contributions for services performed.

In preceding general rate increases, and that made by the Director General of Railroads, sometimes one method and sometimes the other, or a combination of both, has been used. We have never attempted to lay down a rule applicable at all times and upon all commodities, but our decisions have been adjusted to meet the needs of commerce

and industry and to preserve the rights of the parties as we saw them in particular proceedings.

It will not be necessary in the statement of the testimony produced in opposition to the proposals to reiterate these conflicting positions. In general we observe here, as in previous cases, that the positions of the various protestants conform to the patterns above indicated, according to their respective interests.

Products of Agriculture

General.—The position of the Secretary of Agriculture is that a general increase in freight rates and charges should be allowed, but that an increase of 10 percent is unnecessarily large, and that agricultural commodities, including livestock, products thereof, and canned foods, either should be subjected to no increase, or at least that such increases should be less than authorized on other traffic. He points out that petitioners' estimated increased annual cost of approximately $361,000,000 is 6.8 percent of the total net operating revenues in 1941, amounting to approximately $5,300,000,000, which percentage is termed the maximum that should be considered. Even an increase of 6.8 percent, he claims, would be excessive, because of the expected growth in traffic during 1942 and 1943.

Those dependent on rail transportation emphasize their inability to pass on increased transportation charges, and their financial inability to absorb them. The brick and tile industry was adversely affected by the depression in the construction industry. However, conditions in the industry have improved since 1933. In general, while opposing a 10 percent increase, they suggest a graded method of increase be applied if any be approved.

Two brick manufacturers in Iowa do not oppose an increase provided it is by percentage and is less than permitted on general traffic.

Conclusions and Findings.

The general character of the evidence produced by the respective parties and their claims and contentions, based

upon their evidence, have been recited. The weight to be accorded the evidence must be measured to some extent by its self-serving nature, and by its necessarily generalized character, for it was given under circumstances which precluded searching cross-examination or effective rebuttal. The greater part of this testimony was unchallenged and is unrefuted, except as it may be contradicted by the mass of the testimony introduced. Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs. There will be some element of hardship and sacrifice whatever we do, or if we do nothing.

The present proceeding is not the first in which we have been asked to pass upon a general rate increase. During World War I and the ensuing 5-year period there were three such increases of rates and one decrease. In the *Fifteen Per Cent Case*, decided in 1917, 45 I. C. C. 303, eastern carriers were allowed to increase class rates and rates on iron ore 15 percent and in that and related proceedings early in 1918 specific increases on certain commodities were authorized in the southern and western districts, as well as in the eastern district. Again, by General Order No. 28 the Director General of Railroads in 1918 increased freight charges as a whole on a basis intended to yield approximately 25 percent increase in revenue. Commutation passenger fares were increased 10 percent and regular passenger fares were increased to 3 cents a mile with a 16⅔ percent surcharge for travel in sleeping, parlor, and private cars. The surcharge was removed before the end of Federal control. In the general increase of 1920 we authorized increases in freight rates of 40 percent on the eastern railroads, 25 percent on the southern and Mountain-Pacific roads, 35 percent on other western roads, and 33⅓ percent interterritorially. Passenger fares were raised 20 percent, plus a 50 percent surcharge for travel in Pullman cars to accrue to the railroads. A reduction of approximately 10 percent in freight rates generally was ordered in 1922.

In the remainder of the decade 1920-1939 the level of rates and fares was not disturbed by cases of nationwide application. Thereafter, following the inception of the de-

pression we re-examined the general level of these charges in *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, and again in Ex Parte No. 115, supra. In both proceedings small temporary general increases in freight were allowed. Passenger fares were revised downward in 1936. *Passenger Fares and Surcharges, supra.* In 1937 and 1938, in Ex Parte Nos. 115 and 123, general increases in freight rates of from 5 to 10 percent were permitted. Since 1930 there have been many individual adjustments of rates, mostly reductions made voluntarily by railroad carriers to meet actual or threatened competition from other agencies of transport, which resulted in an appreciable lowering of the general rate level.

A nation wide increase, chiefly on a percentage basis, is now proposed. Some important rates average somewhat higher than those effective in 1929, while others are generally lower. Obviously, there can be no detailed ironing out of inequalities in this proceeding.

Not only since this country entered the war, but for some time before by reason of enormous expenditures for national defense preparations, industry generally has felt the impetus of these events directly or indirectly by markedly improved business.

The annual cost of the wage increase late in 1941 was estimated to be $331,771,000 for class I railroad carriers on the basis of the employment of the calendar year 1941. The details of the estimate are given on an earlier page. Of this amount not over $300,000,000 is chargeable to operating expenses as distinguished from tax accruals and capital account. The corresponding totals for 1942 will be greater to the extent of the added number of employes and increase in overtime. There has also been a rise in the cost of materials used by the railways. Notwithstanding the fact that the higher level of operating costs was in large part retroactively effective beginning September 1, 1941, and fully effective on December 1, 1941, the net railway operating income of that year, after deduction from revenues of all expenses, operating rents, and taxes, including payroll and income taxes, was $999,500,000. After the deduction of all accrued fixed and contingent charges the net income available for sinking funds, reserve funds, dividends, and im-

provements was approximately $500,000,000. If pending reorganizations were completed and interest accruals reduced accordingly, this amount would be even larger. This can not, however, be considered too high for a prosperous year following a long period of lean years. Had the higher cost level been in effect throughout the year 1941, the net railway operating income would have been more than $200,000,000 below the $999,500,000.

For 1942 the prospects are for higher railway gross revenues than were reported for 1941. We have approved a 10 percent increase in passenger fares, which became effective on February 10, 1942. This was estimated by petitioners to yield $45,000,000 with the traffic volume of 1941, but in view of the substantial increase in passenger traffic that has already occurred this may turn out to be a considerable underestimate. There is also a prospect of further increase in the volume of freight movement and in the freight revenue in 1942. Such an increase has occurred, and seemingly the trend is still upward. For December 1941, the freight carloadings were 12.1 percent greater than for December 1940 and the freight revenue increased 26.2 percent. The difference in these two percentages is accounted for by the increased proportion of the freight yielding a high revenue per carload. For the first seven weeks of the year 1942 the number of carloadings was 11.7 percent greater than for the like 1941 period. The freight revenue for January 1942 exceeded the January 1941 total by about 26 percent. But whatever the growth in revenue may be, a considerable part of it should be carried into the net earnings. It is clear that the need for increased earnings which the petitioners predicated upon the traffic volume of 1941 is subject to some discount on account of the prospect for a further growth in traffic and the consequent greater net earnings in 1942.

Income tax rates are likely to be higher for 1942 than for 1941, but the effect thereof on net railway operating income could be only a matter of conjecture.

It has been suggested by some of the protestants that a considerable part of these increased expenses, and par-

ticularly the expenses immediately due to war conditions, could be recouped to the rail carriers by a waiver of the "land-grant" rate privilege, whereby military and naval property of the United States and the members of the armed forces traveling on duty are accorded rates (borne by the government) of approximately one half of the going reasonable transportation rates. These "land-grant" rates apply only upon certain roads and portions thereof, but are competitively extended to others. They are now applied to a large and even an increasing proportion of all the shipments made by the Government.

The waiver of the land-grant privilege can come only from Congress. By the Transportation Act of 1940, Congress evinced an intent to restrict this privilege, but it left the law in the condition as to which now both shippers and railroads complain. We have long felt the imposition of land-grant deductions was unfair, and that the main objective of the original grants long ago had been met so thoroughly that now it is equitable that the Government should pay the same reasonable rates for its transportation that its citizens do. But until Congress acts favorably no part of the increased costs can be recouped by the suggested method. In fact, it seems likely that the land-grant deductions will continue and will even increase in the aggregate in the immediate future, unless certain pending legislative proposals for repeal are given favorable consideration by Congress, through an expidited parliamentary process.

Representations were made by some protestants that any increases authorized in this proceeding should be made by the addition of specific amounts rather than by percentage. With the exception of certain important commodities hereinafter mentioned, the nature of the emergency situation and the character of information before us do not permit resort to the suggested method of effectuating an increase in the general rate level.

A rate increase of 10 percent applied to the present increased traffic and that which is reasonably in prospect would yield a larger amount than is necessary to meet the avowed purposes of the increase sought. But a smaller increase is justified.

We have already permitted an increase in the passenger fares, as recited. It is just and reasonable in order that the railways may continue to give the efficient service which is indispensable to our national defense that the body of freight rates and charges, except those hereinafter specifically excepted, shall be increased. We must give weight, in effecting such increase, to the conditions which prevail in the several industries of the country, to the rates upon the commodities these industries produce or manufacture, and to the transportation revenues they yield.

It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the case do not permit such refinement. Further, the weak and strong lines are interlaced and in keen competition, and necessarily the rate structure must be uniform, otherwise the strong road with a lower rate system will attract the competitive traffic and exterminate the weaker line. However, as to certain important commodities it happens that the rate structure is such that the relative strength or weakness of the most important rail carriers involved can be reflected in the rates on the commodities involved. Where the evidence justifies such action, they can receive special treatment, and thereby mitigate the disturbances and inequalities which would follow the imposition of a uniform percentage increase.

The consumers of food will be better off if food be cheap. Thus they may conserve income for war purposes and at the same time increase individual consumption. That they bear a considerable part of the total cost of transportation and distribution seems implicit in recent increases in the retail or final consumer's costs of food products. Advances in the prices of food stuffs, as a major element in the cost of living afford a predicate for renewed demands for higher wages in transportation and other industries. It is in the interest of the carriers and of the public generally that the cost of food shall not be permitted to advance any more than is absolutely unavoidable.

The situation as to relative strength of the Granger roads, and those properly treated as principally agricul-

tural rail lines, is the reverse from that of the principal bituminous coal and iron ore carrying lines in general. The former are relatively weak, and their present revenues have no such cushion as the latter against the wage and other increases here considered. Relatively the agricultural lines do not transport as much high-grade, manufactured traffic as the other roads, not primarily coal carriers. If they are to receive any substantial amount of added income from a general rate increase, the amount which would be allocated to other traffic would be unduly high unless agriculture bears a part of the burden. The increased costs which form the basis of the petition herein are incurred as much for the movement of agricultural commodities as for any other traffic.

Considering the factors involved, it seems just and reasonable to permit the going rates on agricultural products and livestock to be increased by a lesser percentage than non-basic commodities generally. To avoid disruption of the relation between live and dressed animals, and because the products are necessary foodstuffs, certain products of animals hereinafter specified will be treated in the same manner as livestock.

There are also certain other commodities moving in volume, which are generally and properly recognized as basic. These commodities, such as sand, gravel, slag, and low grades of stone, should reasonably bear their share of the increased costs, but not the maximum percentage found to be justified as to the higher grades of traffic.

The remaining articles and descriptions of commodities we see no reason for excepting from general treatment.

We therefore conclude and find that the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable if passenger fares are increased to the extent already permitted by our order, and if freight rates and charges are increased to the extent indicated below and as more particularly specified in Appendix 2.

Upon iron ore and iron sinter, we find that no increase has been justified.

Upon other commodities generally, except such as are described later herein, and upon accessorial charges as specified in Appendix 2, we approve an increase in the present rates and charges of 6 percent.

Upon anthracite, bituminous coal, coke, and lignite, we find that rates stated in amounts per net ton may justly and reasonably be increased 3 cents when the present rate is $1.00 or less and 5 cents when the present rate exceeds $1.00; and that rates stated in amounts per gross ton may be increased 4 cents when the present rate is $1.00 or less per ton, and 6 cents when the present rate exceeds $1.00 per ton, subject to the provisions of Appendix 2.

Upon the basic or raw products of agriculture, animals and products, and products of mines, specified in Appendix 2 hereto, we approve an increase in the present rates and charges of 3 percent.

The application of the percentage increases herein authorized shall be subject to the rule for disposition of fractions set out in Appendix 2.

The increases authorized are upon the presently going rates, speaking as of the date of this report, and rates published and filed but not yet effective, but not upon rates held in abeyance by tariffs naming reduced rates with a future expiration date to be revived upon the expiration by limitation of time of the now effective reduced rates. Such authorized increased rates and charges may become effective not later than May 15, 1942, upon 10 days' notice, as provided by the act.

The various interveners will be authorized to make the same increases as the class I railroads, which we have principally discussed. If this authorization does not dispose of the issues raised by their petitions, the matter may be called to our attention, provided any disputed matters prove to be incapable of adjustment informally.

The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency. Unless sooner modified or terminated in further proceedings herein, or in other proceedings such as the act contemplates may be maintained.

this authorization shall expire six months after the termination of the present war.

The record will be held open for the purpose of giving consideration to any necessary readjustments or corrections which the circumstances may warrant, if brought to attention in the manner prescribed in our rules of practice. The Commission will give any possible aid to the informal adjustment of any matters arising hereunder, if its aid is deemed helpful.

Rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370.

Appropriate orders for relief under sections 4, 6, 217, and 306 of the act will be entered, so as to effectuate in a simple manner the carrying into effect of our authorization and findings; our outstanding orders will be modified accordingly; and the proceeding is continued on our docket.

Chairman Eastman did not participate in the consideration or disposition of this proceeding.

ATTCHISON, *Commissioner*, concurring:

I concur in the foregoing. However, I regard scrap iron and steel and pig iron as similar to iron ore, and of such importance in the national economy at the present time that no increase should be made thereon. With respect to the lower grades of lumber, its products, and similar articles in the lumber list, such as logs, poles, and piling, for the same reasons which lead to the imposition of a lower rate of increase on basic commodities such as sand, gravel, and broken rock, I favor imposing no higher increase on these forest products than on the products of mines named. Further, to mitigate somewhat the effects of a uniform percentage increase applied regardless of distance, I would limit the amount of the increase upon the commodities taking a 3 percent increase, and also the forest products herein mentioned, to a maximum of 3 cents per 100 pounds.

Commissioner Alldredge authorized me to state that he concurs in the foregoing expression.

MAHAFFIE, *Commissioner*, concurring:

To the extent this report results in increases I approve it. I regret that a majority of the Commission could not see its way clear to permit larger increases. Making the increases temporary I think a mistake. Wages are not on a temporary basis.

The railroads seek permission to try to recoup from rates and charges approximately the amount of the increased wages they are required to pay. They are also confronted with mounting costs of materials and supplies. The report allows increases that can reasonably be expected to meet only a part of the rise in wages. Nothing is provided for the other inevitable increases in expense. Transportation by railroad is a vital factor in our war effort. To maintain it so that it may function effectively requires adequate revenues. Its failure might well be disastrous. New transportation facilities must be provided as war needs indicate. To a large extent, the country is relying on the railroads to provide them. The civilian population is increasingly dependent on common carrier transportation to meet its requirements both for passenger and freight service. It will suffer vastly more from any failure

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APPENDIX D.

Interstate Commerce Act.

National Transportation Policy.

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, and 12 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust dis-

criminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, and 12 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15a (2)

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.